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IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Having expressly agreed both in written submission and in open court that John R. Sand's claim alleging a taking of property had been timely filed in the Court of Federal Claims,[1] the United States now defends the *sua sponte* raising of the statute of limitations by the court of appeals by resurrecting a superseded line of decisions that had judicially implied a jurisdictional condition on statutes of limitations in federal government cases. The government modestly portrays its position before this Court as seeking merely to sustain a line of precedent characterizing the statute of limitations codified in 28 U.S.C. § 2501 as jurisdictional in nature.

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[1] In its brief (U.S. Br. at I), the United States reformulates the question presented before this Court to whether the court of appeals should have raised the timeliness question "even though the government did not argue on appeal that the suit was barred" by the statute of limitations. The government's failure to raise the issue on appeal by itself constituted an effective waiver of the statute of limitations. But, even more, the government's action here hardly can be characterized as one of omission. Although the government initially pleaded the statute of limitations as an affirmative defense in the Court of Federal Claims, after discovery and before trial, the government stipulated based on the evidentiary record that John R. Sand's claim accrued within the six-year limitations period (J.A. 37a-40a, Pet. App. 38a; see also U.S. Br. at 6). On appeal, when asked at oral argument, government counsel forthrightly conceded that the claim had accrued within the six-year statutory period and thus was not barred by the statute of limitations (Pet. App. 14a; see also *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006)).

The government's invocation of stare decisis comes nearly twenty years too late. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court explicitly disavowed the government's favored precedent. The government fails to appreciate that the line of cases upon which its argument hinges was born during a nascent stage in the evolution of this Court's sovereign immunity jurisprudence and later was laid to rest when this Court returned its attention to the actual language of the pertinent statutory text and employed a more refined approach to statutory waivers of sovereign immunity.

The government's position both would depreciate the interpretive importance of giving full effect to the plain text of a statutory section in its historical legal context and would upset more than twenty years of this Court's considered decisions treating statutes of limitations and other time limitations on claims against the federal government as properly procedural:

First, § 2501 by its plain terms separates the timeliness inquiry from the threshold jurisdictional determination. In *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002), after giving careful consideration to the statutory language and to the original legal understanding at the time of enactment of the predecessor statute, this Court rejected an "unduly restrictive" reading offered by the government and characterized § 2501 as an "unexceptional" statute of limitations that should be applied to the government in the same way that they apply to private parties.

Second, over the past two decades, this Court has repeatedly turned aside the government's insistence that time limitations should be treated as jurisdictional conditions on the waiver of sovereign immunity. *Bowen v. City of New York*, 476 U.S. 467 (1986); *Irwin, supra*; *Franconia; supra; Scarborough v. Principi*, 541 U.S. 401 (2004). Instead, and in a manner contradicting any jurisdictional classification (see *Bowles v. Russell*, 551 U.S. ___, 127 S. Ct. 2360, 2366 (June 14, 2007) (holding that the "Court has no authority to create equitable exceptions to jurisdictional requirements")), this Court has held that time limitations applicable to federal government cases (specifically including § 2501) presumptively are subject to equitable adjustment as are ordinary procedural rules. *Irwin, supra.*

Under this Court's sovereign immunity jurisprudence over the past two decades, this Court has maintained a strict and jurisdictional construction of the character and scope of claims for relief that are permitted against the federal government. But this Court increasingly has applied procedural requirements against the government in the same manner as among private parties.

Relying instead on policy arguments, the government would rigidly restructure a procedural rule into a jurisdictional absolute. The government insists that a statute of limitations applied to a waiver of sovereign immunity that has fiscal implications (which of course describes nearly *every* waiver of sovereign immunity) must be elevated to jurisdictional status. If, per the government's contention, statutory procedures attendant to waivers of sovereign immunity for

monetary relief are henceforth to be regarded as jurisdictional, the federal courts are about to become much busier than they already are.

By the government's light, whenever a claim for money damages is filed against the government, the federal courts would be obliged *sua sponte* to identify and thoroughly compare each allegation in the claim with an exhaustive (and exhausting) list of every statutory element, exception, time limitation, or other procedural requirement that conceivably could be invoked as a defense to the statutory waiver of sovereign immunity – regardless of whether the government has chosen to assert the matter and even when the government (as here) has deliberately conceded the point. Creating the duty to raise *sua sponte* the statute of limitations would by itself be a laborious imposition on the courts, as the timeliness inquiry often involves complex and fact-intensive questions of when the claim accrued, how the discovery rule should be applied, whether statutory or equitable tolling exceptions are available and how they should be applied, and whether a time bar applies to all claims or requests for relief or only to some.

Accordingly, upholding the venerable understanding that a statute of limitations is an affirmative defense that may be waived is not only consistent with the text and original understanding of § 2501 – and with this Court's rulings over the past two decades – but simply makes good sense for the effective administration of justice in the federal judiciary.

A. The Text and Historical Context of § 2501 – Which Separates the Jurisdictional and Timeliness Inquiries – Should Be the Starting Point and Central Focus of Statutory Analysis.

Reversing the ordinary approach to statutory interpretation, the government leads off with an extended discussion of caselaw and policy arguments and does not focus on the actual text of § 2501 until about two-thirds of the way through its brief (U.S. Br. at 29). And when it does belatedly turn to the language of the statute, the government asks this Court to imagine that a new word has been inserted into the key phrase, thereby altering the text to better align with the government's preferred meaning.

Section 2501 reads, in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claims first accrues." Under what the Chief Judge of the Court of Federal Claims has called the "plain English interpretation of the statute," *Grass Valley Terrace v. United States*, 69 Fed. Cl. 341, 347 (2005), this statute of limitations explicitly assumes that jurisdiction has been established before application of the time limitation. Section 2501 bars a claim that has been filed more than six years after the claim accrues, *when* the claim already is one that falls within the jurisdiction of the Court of Federal Claims (see Pet. Br. at 13-17). Thus, § 2501 is precisely the opposite of a clear statement by Congress directing that a "limitation on a statute's scope shall count as jurisdictional." See *Rockwell Int'l Corp. v. United States*, 549 U.S. ___ (slip

op. p. 9), 127 S.Ct. 1397, 1405-1406 (Mar. 27, 2007), quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516 (2006).

Being uncomfortable with the plain import of the actual text, the government asks this Court to instead read the statute as if it provides that the statute of limitations applies whenever the Court of Federal Claims "*potentially*" has jurisdiction (U.S. Br. at 29-30). With such a textual revision, the government contends that the jurisdictional determination referenced in § 2501 is incomplete and remains open until evaluation of the timeliness of the claim. Unfortunately for the government, the word "potential" is not to be found in the language of the statute. Instead, the term "jurisdiction" in § 2501 is unencumbered and unqualified.[2]

Nor does the government offer any basis for believing that Congress mistakenly omitted the word "potential," either when the present statute was codified or when the predecessor statute was enacted, even if such extrinsic evidence could contradict the plain text of the statute. In fact, the government does

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[2] As noted in John R. Sand's opening brief (Pet. Br. at 26 n.5), the predecessor statute used the term "cognizable," whereas the current statute adopts the term "jurisdiction." As the government acknowledges (U.S. Br. at 30), "cognizable" is synonymous with "jurisdiction," meaning "within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy." See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (quoting *Black's Law Dictionary* 259 (6th ed. 1990)). In the predecessor statute, the term "cognizable" was likewise unqualified and nothing in the text suggested that *potential* cognizability was the expectation.

not challenge John R. Sand's extensive description (Pet. Br. at 24-29) of the legislative history and the contemporary legal understanding surrounding the predecessor statute to § 2501. The legislative history confirms that Congress well understood how to express a jurisdictional grant and used the term "jurisdiction" to describe the class of claims that would be cognizable in the Court of Claims.

By contrast, Congress intended the statute of limitations to be applied in the same manner as among private parties (Pet. Br. at 27-28). Congress's selection of (non-jurisdictional) language commonly found in typical state statutes of limitations of the period, together with an appreciation for the contemporaneous legal environment, confirms the original understanding that this statute of limitations is a waivable defense (Pet. Br. at 28-29).

B. Comparison of the Language of § 2501 With Those Statutes Granting Jurisdiction to the Court of Federal Claims Confirms its Non-jurisdictional and Procedural Nature.

The government quarrels with John R. Sand's argument concerning the codification of 28 U.S.C. § 2501 in a procedural chapter within Title 28 of the United States Code, which is distinct in language and context from the grants of jurisdictional authority to the Court of Federal Claims that are codified in a separate chapter. The government emphasizes (U.S. Br. at 33-34), as John R. Sand forthrightly acknowledged in its opening brief (Pet. Br. at 20), that an uncodified provision from the 1948 codification of Title 28 stated that no inference is to be drawn from the

mere location of a section or from catch-lines in the title. Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991. The government thereby misses the thrust of John R. Sand's argument and too readily slights the structure of Title 28 as being without purpose.

Far from placing conclusive weight on the placement of statutory provisions into a particularly-labeled chapter within Title 28, John R. Sand emphasizes the importance of comparing the distinctly different language adopted by Congress to achieve either jurisdictional or procedural purposes with respect to the Court of Federal Claims. Thus, while the mere location of a statutory section within Title 28 is not dispositive evidence of its nature, Congress's considered decision to codify Title 28 by organizing related provisions together in chapters was not a pointless exercise, devoid of any meaning.

John R. Sand's "structural" argument is another species of the textual argument, underscoring again that careful attention to the specific language employed by Congress should be the central focus of the interpretive quest. As explained in John R. Sand's opening brief (Pet. Br. at 19-24), those statutory provisions, gathered in Chapter 91 of the jurisdictional part of Title 28, that confer jurisdiction on the Court of Federal Claims generally do so by speaking directly in the language of "jurisdiction" and by defining the nature and scope of claims within the court's authority. By contrast, those provisions collected in Chapter 165 on "United States Court of Federal Claims Procedure," address procedural matters and refer to "jurisdiction," if at all, as a matter already confirmed or established.

C. The Government Mistakenly Discounts This Court's Recent Jurisprudence Applying Statutes of Limitations to Claims Against the Federal Government in the Same Manner as Among Private Parties, While Resurrecting a Discredited Line of Cases That Judicially Implied a Jurisdictional Limitation Into § 2501.

Passing lightly over the actual text and disregarding the original legal context and understanding of the statute, the government puts most of its eggs in the one basket of a line of cases beginning with *Kendall v. United States*, 107 U.S. 123 (1883), and ending with *Soriano v. United States*, 352 U.S. 270 (1957). But not only were those decisions doubtful when decided (Pet. Br. at 30-32), the government's precedential egg-basket has long since been upended by this Court (Pet. Br. at 33-40).

In a series of decisions, running from *Bowen* through *Irwin* and culminating most recently in *Franconia Associates*, this Court has rejected the government's plea for jurisdictional absolutism and instead has treated statutes of limitations applicable to claims against the federal government – specifically including the statute of limitations for the Court of Federal Claims (28 U.S.C. § 2501) – as subject to the same principles of equitable tolling as they would be in private litigation and as accruing under the same rules as applicable among private parties.

1. The *Kendall* line of cases arose during an early stage in the evolution of this Court's sovereign immunity jurisprudence. Faced with then-novel

legislation that afforded a general judicial remedy against the federal government for monetary claims, the Court mistakenly fell back upon the familiar but misplaced concept of subject matter jurisdiction in its cautious and uncertain approach to this new statutory category.

During this same time period, the Court narrowly construed the newly-enacted Tucker Act in a manner that denied the full judicial remedy intended by Congress for those suffering a taking of property by the government. If the government seized property (other than by statutorily-authorized condemnation)[3] or deprived individuals of the use of their property, the Court treated the government's action as a tort (trespass) and thus as falling outside of the jurisdictional authority granted by the Tucker Act. See *Hill v. United States*, 149 U.S. 593, 598 (1893). The Court thus left claimants in the awkward position of trying to file suits for specific relief, such as ejectment, against the government official in possession of the property, while contending that sovereign immunity did not bar the suit because the government officer was acting unconstitutionally. In a related but unwieldy

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[3] During this period, even a condemnation case did not give rise to a direct claim in court for a taking of the property founded on the Constitution. Instead, the Court implied a contractual promise by the government to pay just compensation, thus allowing a judicial remedy under the government contract jurisdiction of the Court of Claims. *United States v. Great Falls Mftg. Co.*, 112 U.S. 645, 656-57 (1884). On the evolution of takings claims under the Tucker Act, see generally Gregory C. Sisk, *Litigation With the Federal Government* § 4.08(f), at 327-28 (4th ed. 2006); Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. U. L. Rev. 301. 309 (1997).

attempt to accommodate the concept of sovereign immunity, the Court indulged the legal fiction that a suit for equitable relief against a government officer was not in substance a claim against the government itself, notwithstanding that the officer acted for the government and the relief granted directly affected the government. See *United States v. Lee*, 106 U.S. 196 (1882).

2. Over time, this Court has developed a more mature and refined approach toward the increasingly common-place judicial encounter with a statutory waiver of sovereign immunity and has corrected its earlier missteps. In 1946, this Court effectively overturned 50 years of caselaw and upheld jurisdiction under the Tucker Act for claims alleging any form or manner of the taking of property rights by the government: "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States v. Causby*, 328 U.S. 256, 267 (1946).

Three years later, the Court abandoned the officer suit fiction in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (plurality), holding that the Court must look to the relief sought in the suit to determine whether, although nominally framed against an officer, the complaint in reality is pressed against the federal government itself. See also *Malone v. Bowdoin*, 369 U.S. 643 (1962) (holding that, unless a government officer acts beyond statutory or constitutional powers, the suit is one against the government itself and within the doctrine of federal sovereign immunity).

In the final stage in the evolution of sovereign immunity jurisprudence over the past quarter-century, this Court now demands an express and unambiguous congressional statement of consent to suit, with a strict and narrow construction applied to the scope of such consent, but by contrast construes procedural provisions in a manner consistent with private litigation.

3. In *Irwin*, in the course of stating a general presumption that a statute of limitations applicable to a waiver of sovereign immunity is subject to equitable tolling in the same manner as to private parties, the Court laid to rest the archaic *Kendall-Soriano* line of cases. The government resists this conclusion (see U.S. Br. at 36-39), apparently because *Irwin* failed to use the magic word "overrule." But *Irwin's* disavowal of *Soriano's* cramped jurisdictional approach hardly constituted a *sub silentio* overruling.

In the course of considering the availability of equitable tolling of the statute of limitations for Title VII claims against the government, the Court in *Irwin* settled upon a general presumption that every statute of limitations on a government claim is subject to equitable tolling. The Court noted that the prior holding in *Soriano* that a claim was "jurisdictionally barred" by § 2501 stood in tension with the tolling of the statute of limitations in a claim against the government in *Bowen v. City of New York*. See *Irwin*, 498 U.S. at 94 (explaining that decisions "have not been entirely consistent"). Considering the specific language of § 2501, in comparison with that for the time limit in Title VII, the Court concluded:

> An argument can undoubtedly be made that the latter language [§ 2501] is more stringent than the former [Title VII], but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling. Thus a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.

Id. at 95; see also *id.* at 98 (White, J., concurring in part and concurring in the judgment) (objecting to majority's holding because "it directly overrules a prior decision by this Court, *Soriano v. United States*, 352 U.S. 270 (1957)"). By adopting a general rule of equitable tolling in civil cases against the government, with specific reference to § 2501, the Court made plain the non-jurisdictional nature of these statutes of limitations.

The new path forged by *Irwin* was more recently confirmed in *Franconia*, where this Court unanimously rejected the government's argument for a "special" accrual rule under § 2501 by reason of sovereign immunity; described the government's position as an "unduly restrictive" reading of the congressional waiver of sovereign immunity, rather than "a realistic assessment of legislative intent;" declared that § 2501

by its language and the original understanding of its predecessor statute is an "unexceptional" statute of limitations; and stated that "limitations principles should generally apply to the Government in the same way that they apply to private parties." *Franconia*, 536 U.S. at 145.

4. As the government observes (U.S. Br. at 19-21), the Court generally is reluctant to disturb statutory precedents given that Congress remains empowered to correct any error that it perceives in the Court's interpretation of a statute. But even in cases of statutory interpretation, "stare decisis is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (unanimously overruling statutory interpretation precedent). This Court will overrule a statutory precedent when "the growth of judicial doctrine" has "weakened the conceptual underpinnings" of prior decisions. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

Irwin's rejection of *Soriano* fits comfortably within this Court's general approach to stare decisis in the area of statutory interpretation. One "traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson*, 491 U.S. at 173 (internal citations omitted). As *Irwin* explained, the "ad hoc" approach to statutes of limitations applied in past inconsistent decisions, such as *Soriano*, had resulted in "continuing unpredictability without the corresponding advantage

of greater fidelity to the intent of Congress." *Irwin*, 498 U.S. at 94.

Accordingly, as had *Larson* through its clarification of sovereign immunity doctrine and abandonment of the awkward government officer suit fiction forty years earlier, *Irwin* "cut[] through the tangle of previous decisions" and adopted a general and consistent approach to procedural time limitations on statutory waivers of sovereign immunity. See *Malone*, 369 U.S. at 647 (describing *Larson* decision).

5. In the years since *Irwin*, when this Court has determined that an exceptional statute placing a time limitation on a claim against the federal government is not amenable to equitable tolling, the Court has found the *Irwin* presumption to be rebutted based upon a careful examination of the statutory language and an assessment of legislative intent – not by characterizing a statute of limitations as a jurisdictional requirement. See, *e.g.*, *United States v. Brockamp*, 519 U.S. 347, 350-52 (1997) (statutory limitations period on filing claims for tax refunds could not be equitably tolled in view of the tax statute's detailed, repetitive language and numerous exceptions); *United States v. Beggerly*, 524 U.S. 38, 47-49 (1998) (equitable tolling is not available under the Quiet Title Act, 28 U.S.C. § 2409a, which provides an "unusually generous" 12-year limitations period and already incorporates a form of tolling).

That a particular statute of limitations may be mandatory and not subject to deviation when properly invoked by a party does not make it a jurisdictional requirement that cannot be waived by a defendant and that must be raised on the court's own initiative. See

Farzana K. v. Indiana Dep't of Education, 473 F.3d 703, 705 (7th Cir. 2007) (Easterbrook, J.) ("The law is full of rules that are mandatory in the sense that courts must enforce them punctiliously if a litigant insists. Rules are not jurisdictional, however, no matter how unyielding they may be, unless they set limits on the federal courts' adjudicatory competence.").

6. This Court's decision last term in *Bowles v. Russell* offers no support for the government's assertion that § 2501 or any statute of limitations should necessarily be given a jurisdictional construction. In affirming the historical understanding that a timely notice of appeal is jurisdictional, the *Bowles* majority avoided any use of the phrase "statute of limitations" and any citation to decisions involving statutes of limitations, withholding any such mention even in response to references by the dissenting opinion. From the common law to the present, statutes of limitations have been understood as procedural in nature, an affirmative defense to be pleaded and established by the defendant, and subject to waiver or forfeiture (see Pet. Br. at 28-29).

Other than to confirm that no time limitation subject to equitable adjustment could be characterized as jurisdictional (*Bowles*, 127 S. Ct. at 2366), the *Bowles* Court carefully refrained from creating any conflict with other precedents that confirm statutes of limitations as subject to equitable tolling and waiver. Accordingly, *Bowles* is consistent with this Court's statute of limitations jurisprudence, which recognizes that statutes of limitations "are primarily designed to assure fairness to defendants," rather than to limit jurisdiction. See *Burnett v. New York Cent. R. Co.*, 380

U.S. 424, 428 (1965); see also *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

D. The Government's Policy Argument That a Statute of Limitations on a Waiver of Sovereign Immunity Affecting the Public Fisc Should Be Elevated to Jurisdictional Status Finds No Support in the Statutory Text, Conflicts With This Court's Recent Precedents, and Sweeps Too Broadly.

Before directing its attention to the text of the statute at issue in this case, the government presses the policy argument (U.S. Br. at 22-26) that, because the United States may not be sued at all without its consent, a time limitation on a statutory waiver of sovereign immunity that has financial implications for the government should be elevated to jurisdictional status. Although characterizing this hypothesis as "simply one means by which Congress has sought to maintain adequate control over the public fisc" (U.S. Br. at 25), the government does not base this argument on anything in the text or history of § 2501 that evidences such a congressional intent. Instead, the government invokes a general and vague policy of protecting federal funds that, upon inspection, simply proves too much.

Because it is not tethered to the text or history of a specific statutory provision, the government's policy argument effectively would transform every jot and tittle remotely related to a waiver of sovereign immunity into a jurisdictional command, impressing a duty on the federal courts to *sua sponte* ascertain the

satisfaction of each statutory element, regardless of whether the government raises or even deliberately waives the matter.

The government's abstract "protection-of-the-public-fisc" rationale for conversion of a procedural rule into a jurisdictional requirement is mistaken, misplaced, or overstated in several ways.

1. Section 2501 applies to more than monetary claims against the public fisc. Even though the traditional money claim under the Tucker Act remains the grist for the Court of Federal Claims mill, Congress increasingly has granted to the Court of Federal Claims meaningful and considerable equitable powers. Under 28 U.S.C. § 1491(a)(2), the Court of Federal Claims may grant equitable relief collateral to a money judgment.

In addition, the Court of Federal Claims has jurisdiction to grant declaratory and injunctive relief, as well as or rather than money damages, in bid protest cases. 28 U.S.C. § 1491(b). Thus, § 2501 – as the general statute of limitations for claims in the Court of Federal Claims – is not a peculiar proviso attached to a particular jurisdictional grant that invariably involves a monetary claim.

2. The government's "public-fisc-protection-equals-jurisdiction" argument has no logical stopping place, either to apply only to one statutory waiver of sovereign immunity or to apply only to a time limitation. Nearly every statutory waiver of sovereign immunity – including the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2674-80; the Suits in Admiralty Act, 46 U.S.C. § 30901 *et seq.*; Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e-16(a); and, the statute that gives rise to the greatest number of lawsuits each year against the federal government, the Social Security Act, 42 U.S.C. § 406(g) – authorizes court awards that confer monetary relief. Even the Administrative Procedure Act, 5 U.S.C. § 702, has been construed to allow the courts to order specific relief for payment of money by the federal government. See *Bowen v. Massachusetts*, 487 U.S. 879, 891-908 (1988).

Thus, the government's public fisc argument sweeps within the jurisdictional ambit the procedural provisions of nearly every one of the dozens of federal statutes that waive sovereign immunity.[4] But see *Scarborough*, 541 U.S. at 420-21 (holding that the time prescription for seeking attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 – yet another waiver of sovereign immunity for a monetary award – should apply to the government in the same

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[4] Extrapolating from the fact that the time period for filing a notice of appeal held to be jurisdictional in *Bowles v. Russell* was found in a statute (rather than a court rule), amicus Metamora Group suggests that every time limitation stated in a statute should henceforth be regarded as jurisdictional (Amicus Metamora Group Br. at 17-20). The Metamora Group's argument would radically change the historical and universal understanding of statutes of limitations. Every statute of limitations, of course, is a *statute* of limitations. If every statute of limitations were now to be converted into a jurisdictional prerequisite, the traditional understanding of statutes of limitations as waivable affirmative defenses would be turned upside down, Federal Rule of Civil Procedure 8(c) would be effectively repealed, and this Court's recent decision in *Day v. McDonough*, 547 U.S. 198, 205 (2006), that "[a] statute of limitations defense * * * is not 'jurisdictional,' " would be abruptly overruled. And, indeed, the Metamora Group (Amicus Metamora Group Br. at 22-24) does urge this Court to overrule its recent (and unanimous on this point) decision in *Day*.

way as to private parties); *Bowen v. City of New York*, 476 U.S. at 478-82 (rejecting the argument that the time limitation for district court review of claims seeking disability benefits from the government is jurisdictional).

Nor can the government's argument that any limitation that protects the public fisc thereby takes on jurisdictional dimension be confined to time limitations for filing, as every statutory element, limitation, exception, and procedural requirement has a more or less direct consequence for whether a claim will proceed to eventual success and a monetary judgment. Thus, the government's argument effectively demands jurisdictional rigidification of every word and phrase contained within every statute related to a waiver of sovereign immunity.

3. Premised as the government's argument is on the proposition that "in a suit against the United States, the terms of the government's consent define the jurisdiction of the court" (U.S. Br. at 9; see also U.S. Br. at 23), this policy rationale is weakest when applied as here to a taking claim, given the self-animating nature of the Fifth Amendment just compensation clause. As explained in John R. Sand's opening brief (Pet. Br. at 43), a canon of strict construction, especially one that implies jurisdictional status in an unexceptional statute of limitations, is misplaced when applied to a self-executing constitutional claim.

E. Because the Government Deliberately Waived the Statute of Limitations, the Decision of the Court of Appeals to Raise the Statute of Limitations *Sua Sponte* Cannot Be Sustained on Discretionary Grounds.

This Court should not be distracted by amicus Metamora Group's demand (Amicus Metamora Group Br. at 3-16) to be recognized as some kind of *über*-amicus, which then is privileged to shoulder the United States aside and override its deliberate waiver of any objection to the timeliness of John R. Sand's claim, to rewrite the jurisdictional decision of the court of appeals into an unremarkable exercise of discretion, or to presume to suggest that this Court acted improvidently in granting the petition for certiorari.

As discussed in John R. Sand's opening brief (Pet. Br. at 47-48), the government expressly conceded in open court that the claim was timely and not barred by the statute of limitations, the court of appeals made plain that its decision was grounded solely on the purported jurisdictional nature of the statute of limitations, and this Court has held that it is an abuse of discretion for a court to override a party's conscious waiver of a statute of limitations.

In *Day v. McDonough*, 547 U.S. at 202, this Court's adamance about the constrained discretion of a court to raise a statute of limitations issue *sua sponte* was unusually explicit: "Ordinarily in civil litigation, a statutory time limit is forfeited if not raised in a defendant's answer or in an amendment thereto. Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a). And we would

count it an abuse of discretion to override a State's deliberate waiver of a limitations defense."[5] Subsequently in the majority opinion, the Court emphasized that point again: "A district court's discretion is confined within these limits. As earlier noted, should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice." 547 U.S. at 210 n.11. Three members of the Court would have gone further and held that a court lacks discretion under *any* circumstances to revive a waived statute of limitations objection, whether the waiver was deliberate or inadvertent. *Id.* at 212-19 & n.3 (Scalia, J., dissenting).

Amicus Metamora Group wrongly insists that it has special privileges to stand in the shoes of an actual party to the suit and to direct the management of litigation involving the federal government. First, the Metamora Group's motion to intervene either as of right or permissively into this lawsuit was denied by the Court of Federal Claims, ironically in part because it was not timely filed, *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645 (2004), and that denial was affirmed on appeal by the Federal Circuit, *John R. Sand & Gravel Co. v. United States*, 143 Fed. Appx. 317 (Fed. Cir. 2005). As the Court of Federal Claims correctly ruled: "This court can only determine whether plaintiff is entitled to just compensation; it cannot determine whether members of the Metamora Group must pay defendant the amount of any judgment

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[5] *Day*'s holding applies to pleadings in the Court of Federal Claims. Rules 8(c), 12(b) and 15(a) of the Rules of the Court of Federal Claims mirror their counterparts in the Federal Rules of Civil Procedure.

the court may grant in this case. Intervenor-applicants can protect their interest by contesting in another forum any attempt by defendant to seek reimbursement for any settlement or judgment that may occur in this case." *John R. Sand*, 59 Fed. Cl. at 652.

Second, collaterally interested parties have no standing to override the ordinary rules of litigation, including those regarding waiver of an affirmative defense. Other parties potentially affected by or possibly liable to indemnify or reimburse a defendant for liability to a plaintiff are commonly in the background in many types of lawsuits. Amicus Metamora Group's situation and status here is no different from that of insurers, contractual indemnitors, corporate shareholders, other tortfeasors, and other derivatively liable persons who may be affected by the outcome of a liability suit or whose duty of contribution in tort or indemnification by contract may be triggered by the outcome of a liability suit against a particular defendant, but who have no right to control the litigation absent intervention.

The government's deliberate waiver of the statute of limitations may (or may not) provide a defense to the amicus to a later claim by the government for indemnification.[6] But that is an intramural matter between amicus Metamora Group

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[6] The Metamora Group acknowledges in a footnote that its liability does not automatically follow from a judgment in favor of John R Sand. Amicus Metamora Group Br. at 13 n.6. In sum, the question of any application of this matter to a future proceeding is collateral and premature.

and the United States for possible future resolution in another proceeding before a different court (which would be neither the Court of Federal Claims nor the Federal Circuit).[7] It does not affect the government's waiver of the statute of limitations as to John R. Sand in this matter filed in the Court of Federal Claims, is of no interest to this Court on review of the decision of the Federal Circuit, and is of no significance to the disposition of this present matter.

CONCLUSION

The judgment of the court of appeals should be reversed, the dismissal of petitioner's complaint should be vacated, and this case should be remanded for further proceedings on the merits.

Respectfully submitted,

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[7] The United States District Court for the Eastern District of Michigan has continuing jurisdiction over disputes arising from the consent decree between the United States and the Metamora Group regarding this hazardous waste site. *United States v. BASF-Inmont Corp.*, 819 F. Supp. 601, 630 (E.D. Mich 1993).